84-1464

NO. 84-1641

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDWARD RONWIN, DAVID L. WETSCH, MIKE CHRISTENSEN, JAMES D. BIRKENHOLZ AND BRUCE G. MOUNTAIN,

Petitioners,

vs.

SUPREME COURT OF IOWA,

Respondent.

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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April 12, 1985
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QUESTIONS PRESENTED

1. Whether rulemaking by a state supreme court establishing an Interest On Lawyers Trust Account program is a judgment appealable to this Court under 28 U.S.C. § 1257.

2. Whether an Interest On Lawyers Trust Account program violates due process of law where the fund is derived only from interest on pooled accounts where individual client principal is so small or held for such a short period of time that transactions and maintenance costs preclude crediting of interest to individual clients.

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CONSTITUTIONAL PROVISIONS

United States Constitution,

Fifth Amendment:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be

taken for public use, without just compensation.

Fourteenth Amendment:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

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SUPREME COURT OF IOWA,

Respondent.

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA CONSTITUTIONAL PROVISIONS

Respondent the Supreme Court of the State of Iowa respectfully prays that this Court deny Petitioners' request that a Writ of Certiorari issue to review rulemaking by the Iowa court establishing an Interest On Lawyers Trust Account Program in Iowa.

STATEMENT OF FACTS

On September 25, 1984, the Iowa State Bar Association filed with the Iowa Supreme Court a document entitled Application to Amend the Code of Professional Responsibility and to Create A Lawyer Trust Account Commission. On October 12, 1984, the Iowa Supreme Court invited briefs from "any interested organization, agency, or person."

The Petitioners in this proceeding filed a brief with the Iowa Supreme Court in opposition to the proposed rulemaking and participated in oral argument before the Court. On December 12, 1984, the Court entered an order amending the Iowa Code of Professional Responsibility to establish an IOLTA program.

The Petitioners now seek a writ of certiorari to the Iowa Supreme Court challenging the constitutionality of the IOLTA program.

REASONS FOR DENYING THE WRIT

I. RULEMAKING BY A STATE SUPREME COURT ESTABLISHING AN INTEREST ON LAWYERS TRUST ACCOUNT PROGRAM IS NOT A JUDGMENT APPEALABLE TO THIS COURT UNDER 28 U.S.C. § 1257.

Upon application by the Iowa State Bar Association, and after notice and comment, the Iowa Supreme Court promulgated generally applicable disciplinary rules establishing a mandatory IOLTA program in Iowa. See Iowa Code of Professional Responsibility, DR 9-102, 9-103, as reproduced in the Petition for Writ of Certiorari, Exhibit A. In promulgating disciplinary rules regulating the practice of law in a state, a state supreme court is exercising a legislative function. Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 731 (1980).

This Court is not the proper forum to launch an attack on legislative actions by a state supreme court. The proper avenue for obtaining review of judicial rulemaking is an action in federal district court where a

particularized complaint may be considered in light of a properly developed factual record. Rapp v. Committee on Professional Ethics and Conduct, 504 F.Supp. 1092, 1097 (S.D. Iowa 1980).

The issue of standing in this case illustrates the impropriety of allowing Petitioners to proceed under 28 U.S.C. § 1257. At this stage of the proceeding, it is not clear whether any of the Petitioners actually maintain trust accounts that would be within the scope of the challenged disciplinary rules. As a result, petitioners may lack standing to litigate. Warth v. Selden, 422 U.S. 490 (1975). Moreover, even if the parties do have standing, sound principles of constitutional adjudication require that the impact of the rules on these particular parties should be developed in a proper forum before the constitutional issues are presented to this Court for authoritative determination.

II. NO SUBSTANTIAL CONSTITUTIONAL QUESTIONS HAVE EMERGED IN THE COURTS REGARDING SIMILARLY STRUCTURED IOLTA PROGRAMS.

As noted by the Iowa State Bar Association in its brief to the Iowa Supreme Court supporting the challenged rulemaking, the underlying premise of Iowa's IOLTA program is that lawyers' pooled trust accounts consist of multiple deposits which are so small in amount or held for so short a period of time that it is not practicable to allocate earnings thereon to individual clients. Brief of Iowa State Bar Association, at 8. In re Petition of the Iowa State Bar Association, No. 84-1641 (Iowa 1984). Indeed, the trust accounts become capable of earning sufficient interest solely because of the pooling of numerous deposits which would otherwise individually produce interest in amounts insufficient to pay the administrative costs of recovery. See Iowa Code of Professional Responsibility, DR 9-102(c)(1)-(3).

No court of last resort has found any constitutional infirmity in a similarly structured IOLTA program. The two leading state supreme court decisions uphold income creating IOLTA programs from due process attack on the ground that clients are not deprived of any constitutionally protected property interest where but for an IOLTA program, no interest could be accumulated for the benefit of individual clients because of administrative costs. See In re Petition of the Minnesota State Bar Association, 332 N.W.2d 151, 158 (Minn. 1982); In re Interest on Trust Accounts, 402 So.2d 389, 395 (Fla. 1981).

The Petitioner suggests that the rulemaking by the Iowa Supreme Court is contrary to Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980). In Beckwith, this Court considered whether the state of Florida could retain over $100,000 in interest earned on $1,812,145.77 that was held by the court in an interpleader

proceeding pursuant to a state statute. Under the circumstances presented, the Court held that where a state statute required deposit of funds with the court in order for the deposits to obtain statutory protection from the claims of creditors and others, the state could not retain interest earned on the account without violating due process of law. 449 U.S. 164-65. Beckwith, however, is easily distinguishable from the present case.

First, administrative costs associated with crediting earned interest to the proper parties in Beckwith obviously would not have exceeded the earned income of over $100,000. Under the Iowa IOLTA program, however, the earned interest on pooled trust accounts becomes available to the state only where the amounts are so nominal and held for such a short period of time that it is not administratively feasible to credit earned interest to individual clients. See Iowa Code of Professional Responsibility, DR 9-102(c)(1). Since Iowa's program creates

income where there had been none before and the income thus created would not have been available to benefit a client under any set of circumstances, Beckwith has no application. See In re Interest on Trust Accounts, supra, at 395.

Second, the money in Beckwith was required to be placed in an interpleader fund in order to obtain statutory protection. Under the IOLTA program in Iowa, however, no lawyer is required to establish a lawyer's trust account. They are voluntarily established for the convenience of lawyers and their clients. Access to the courts may be completely obtained by any and all lawyers on behalf of any and all clients without use of a trust account. As a result, no "taking" of property under Beckwith principles will occur through operation of Iowa's IOLTA program. See In re Interest on Trust Accounts, supra, at 396.

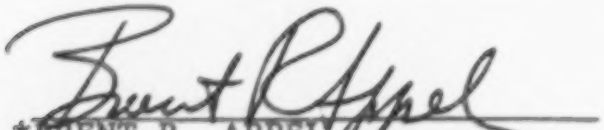
Because of the lack of controversy over income generating IOLTA programs in the courts, there is no substantial basis for granting a certiorari petition in the present case. Even if the issues were worthy of review, the Court should await the development of a body of case law in the lower courts that illuminate differing approaches to the constitutional issues in a variety of settings.

CONCLUSION

For the above reasons, the petition for a writ of certiorari in the above-captioned matter should be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



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